No. 12038

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN E. HUMES, *Appellant*,

vs.

ALASKA TRANSPORTATION COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

BASSETT & GEISNESS,
Proctors for Appellant.
811 New World Life Building,
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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction of the District Court

The appellant herein was a seaman aboard the M.S. CLOVE HITCH, when on March 9, 1948, he left the vessel at Skagway, Alaska, under circumstances hereinafter described. The captain of the vessel logged him as a deserter and thereafter on May 14, 1948, the United States Shipping Commissioner paid the wages due him into the United States District Court for the Western District of Washington, Northern Division, together with a document known as Account of Wages of Deserting Seaman. Appellant appeared in the District Court and demanded the payment of said wages to him.

Primary jurisdiction of the District Court is granted by the provisions of Section 41, Title 28, U.S. C.A., vesting jurisdiction of all admiralty causes in Federal District Court. More specifically, this particular proceeding is governed by several sections of Title 46, U.S.C.A., which follow:

Title 46, Section 701 U.S.C.A., provides:

> "Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:
>
> " 'First, for desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned. * * *'."

Title 46, Section 706 U.S.C.A., provides that all such wages which are forfeited for desertion

> "shall be applied in the first instance in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any Shipping Commissioner resident at the port at which the voyage of such vessels terminate; and the Shipping Commissioner shall account for and pay over such balance to the Judge of the District Court within one month after the Commisioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects and wages of decedent seamen * * *."

Title 46, Sections 626, 627 and 628 U.S.C.A., with reference to deceased seamen's wages and effects provide that the same shall be paid by the Shipping Com-

missioner to the District Court and the District Court shall determine the claimants thereto and distribute the balance to the Treasury of the United States to a fund appropriated to the relief of sick, disabled and destitute seamen belonging to the United States Merchant Marine Service.

The Jurisdiction of the Circuit Court of Appeals

The jurisdiction of this court is granted by the provisions of Section 225, Title 28 U.S.C.A., which give the Circuit Courts of Appeals jurisdiction of all appeals from final decrees of District Courts. This section has been, in substance, re-enacted in the new codification of the judicial code effective September 1, 1948, Title 28, Section 1291 U.S.C.A.

STATEMENT OF THE CASE

The procedure by which this cause was heard appears somewhat confused in the record, so for clarification some of the facts concerning it are here set forth.

The petitioner herein, John E. Humes, was alleged to have deserted the M.S. "CLOVE HITCH" at Skagway, Alaska, on March 9, 1948. On May 13, 1948, the "CLOVE HITCH" arrived at Seattle, Washington, and paid off (Ap. 21). At that time the petitioner was at the ship and protested (Ap. 21). The Shipping Commissioner thereupon set a hearing at his office for the following day, May 14, 1948, at noon (Ap. 22). No representatives of the company appeared at that hearing (Ap. 22). The account of wages was filed in District Court by the Commissioner that same day,

May 14, 1948, and the court thereupon set the following morning, May 15, 1948, for the hearing (Ap. 24). In the meantime some matters apparently transpired which are not of record, for at one o'clock on May 14, 1948, counsel for petitioner were advised that a hearing was scheduled on this matter for 1:30 of that day. Counsel for petitioner learned and informed the court that the reason the hearing had been moved up to that afternoon was that the "CLOVE HITCH," then being in Seattle, was sailing at 5:00 o'clock that afternoon (Ap. 17) and it was felt that the steamship company might have desired to have the captain of the ship testify (Ap. 29). The petitioner could have testified the following day (Ap. 29), as he was then serving aboard the "RAIN SPLICE" which was not due to sail from Seattle for six days (Ap. 28). The trial court apparently misunderstood in assuming and stating that the hearing was expedited for the benefit of petitioner (Ap. 24). At the conclusion of the afternoon hearing the matter was continued until the following morning at which time it was concluded.

At the hearing the evidence showed the following state of facts. The petitioner, John E. Humes, has been a seaman for sixteen years (Ap. 32). Prior to March 9, 1948, he had ben serving aboard the "CLOVE HITCH" for approximately thirteen and one-half months and had made about fifteen round trips between Alaska and Seattle (Ap. 32).

On or about March 9, 1948, the vessel was at Skagway, Alaska (Ap. 2). At that time there was an equidemic of virus flu in the community (Ap. 19)

from which about seventy-five per cent of the town was suffering (Ap. 26). The petitioner was a winch driver required to work on open deck (Ap. 25). The vessel had been in Skagway for approximately two weeks prior to March 9 (Ap. 25) during all of which time petitioner had performed his duties.

Petitioner got the flu "or something" and twice asked the purser for a hospital slip (Ap. 25, 26). The purser refused (Ap. 25). The petitioner then asked the captain about a hospital slip and was referred back to the purser (Ap. 26).

The petitioner then went to Doctor Dahl, the Skagway Railway doctor, who gave him some sulpha pills (Ap. 26) and a letter that petitioner had been in there and probably had the virus flu, which required bed rest (Petitioner's Ex. 1, Ap. 35).

Petitioner then demanded wages from the captain, which were refused (Ap. 27). The following day (March 9, 1948) petitioner took his gear, left the vessel and flew to Seattle, arriving on Thursday. He went to bed where he stayed until Monday morning (Ap. 40). On Monday morning, March 15, 1948, he presented himself to Dr. R. E. Seth, M.D., who diagnosed his condition as Virus X and gave him penicillin and diathermy treatments on March 15, 17 and 19, 1948 (Petitioner's Ex. 2, Ap. 36). For these services the doctor charged petitioned $14.00 (Petitioner's Ex. 4, Ap. 37).

The captain of the vessel logged petitioner as a deserter (Ap. 18, 19). A representative of the company secured a second statement from Doctor Dahl

(Ap. 50) in which he stated that *the petitioner had no temperature at the time he called,* but that there was an epidemic of virus flu and *he had suggested that the petitioner go to bed and stay there until such time as his temperature was normal.* (Sed quaere.) The doctor went on to state that he realized he was "taken in" by petitioner and that petitioner's breath had had a liquor odor (Ap. 19). This letter was entered in the log (Ap. 19).

The vessel was due to go non-stop to Texas from Skagway and the purser, who was also the pharmacist's mate, was under instructions to leave the vessel at Skagway (Ap. 64).

The company is required by union contract to carry winch drivers to Alaska but not to Texas. Although no replacement was secured for petitioner when the vessel left Skagway bound for Texas she was manned within the law and in such a manner that she could be operated properly (Ap. 68).

The court rendered it's oral decision (Ap. 3, 4, 5, 6, and Ap. 72, 73, 74, 75, and, pursuant thereto, entered it's order adjudging petitioner guilty of desertion and ordering $200.00 of his pay forfeited (Ap. 7, 8). Petitioner appeals to this Court from that order.

SPECIFICATION OF ERRORS

The appellant specifies as errors the folowing:

(1) The District Court erred in holding that the petitioner was guilty of desertion;

(2) The District Court erred in holding that the petitioner left his ship wthout justification;

(3) The District Court erred in assessing an excessive penalty under the circumstances.

All the above specifications of error are to be found in the Appellant's assignment of errors at page 10 of the Apostles.

ARGUMENT

I.

The District Court erred in holding that the petitioner was guilty of desertion and in holding that he left his ship without justification (Specification of Errors 1 and 2).

Desertion by a seaman consists in the abandonment of duty by quitting the ship before the termination of his engagement without justification and with the intention of not returning. See *The City of Norwich*, 279 Fed. 687, 698; *In re Williams* (4 C. C.A.) 139 F.(2d) 262. Petitioner herein contends that he was justified in leaving the vessel.

In *Gifford v. Kollock*, Fed. Case No. 5409, 3 Ware 45, a father apprenticed his son aboard a whaling vessel for a long voyage. During the time it was out, the son drew certain sums by way of advancements from the captain. Amongst these was an item of $300.00 for clothing, which the court found unjus-

tified and not necessary. The vessel reached Australia and was from there bound for home. The son who had during the voyage become of age, in fear of his father because of these advances, left the vessel. The court refused to forfeit the seaman's wages for desertion saying at page 343:

> "The law looks with indulgence on the faults of seamen when they are free from malignity and arise from thoughtlessness, improvidence and that want of consideration which is so characteristic of them as a class. In such cases it inflicts its penalties with gentleness and reluctance; and in so doing it will look to the conduct of the officers toward the men, as well as making some allowance for the habitual improvidence of the men. And this it will especially do when such conduct may in any way have tended to produce the fault which it is sought to punish."

The claims of seamen for their wages have always been favored by courts of admiralty. In *The City of Norwich*, 279 Fed. 687, 695, the court said:

> "The libelant seeks recovery of wages and the claims of seamen for wages are highly favored by the court. See Idle Hour, C.C.A. 63 Fed. 1018."

In forfeiting the wages of a seaman for desertion the burden of proof is on the ship owner to establish the desetion. *In re Williams* (C.C.A.) 139 F.(2d) 262; *The City of Norwich*, 279 Fed. 687, 698.

Desertion of a vessel by a seaman is and always has been regarded as a highly serious offense and is not to be lightly treated nor is he to be convicted thereof unless it is clearly shown. In *The City of Norwich, op. cit.*, the court said at page 699:

> "The desertion of a ship by seamen has always been regarded by the maritime law as a very serious misconduct. A Hanseatic ordinance of 1380 made it a crime punishable by death and a later ordinance of 1591 made it punishable by branding, and various early ordinances made it punishable by imprisonment. And even under Article 221 of the Merchant Shipping Act of Great Britain of 1894 a seaman on a British ship who deserts is still liable under some circumstances, to imprisonment."

Because of these considerations and many others the courts have been extremely liberal in their interpretation of what constitutes justificaton for leaving a vessel. In *The Mt. Everest*, 17 F.(2d) 478, the Circuit Court of Appeals held that the exaction of 10 hours work per day when the articles called for only 8 hours justified the seamen in leaving the vessel and that as a result they were not guilty of desertion.

The District Court of Washington held in *The Forteriot*, 98 Fed. 440, that a seaman was justified in leaving a vessel having insufficient food and was not a deserter for so leaving.

The courts have always held that mariners had the right to leave a vessel on which they were ill-treated. For example in *Coffin v. Weld*, Fed. Cas. No. 2953, 2 Lowell 81,. the court said:

> "Mariners have a right to leave a vessel on which they are constantly and persistently ill-treated; and by the general maritime law such conduct is not desertion; and they may recover full wages notwithstanding."

See also *Bush v. The Alonzo*, Fed. Cas. No. 2223, 2 Cliff. 548.

Similarly it has been held that a seaman's wages will not be forfeited where his actions were based upon a mistake as to his rights. *Magee v. Ross*, Fed. Cas. No. 8944. In that case the charter called for a trip to a South American port or others. The captain wanted to make a trip to Marseilles, France, under these articles. The seamen believed that they were not obliged to make such a trip under those articles and left the vessel. The court held that the articles were sufficiently broad and that they were under those articles obliged to make the trip to Marseilles, France, but nevertheless refused to forfeit their wages on the grounds of desertion, saying at page 388, 389:

> "The libelants left the ship under a belief that they had a right to do so; that the intention to take them to Europe was a breach of the contract, and discharged them from it. They also thought that the treatment they had received from the captain dissolved their contract. They were misaken on both points; it was a mistake of law of their case, and not a mutinous resolution to disregard their contract, and the law which bound them to it. Their conduct shows that they had a sincere confidence in their opinion and were willing to bring it to a fair test."

A case very similar to that at bar is *In re Williams* (C.C.A. 4, 1943) 139 F.(2d) 1262. In that case the seaman was suffering from a chronic illness for which he was ridiculed by the master and the other seamen and they accused him of loafing and faking illness.

He went ashore for treatment and refused to return to the ship. He also demanded half his pay which the captain refused and thereafter the seaman refused to rejoin the vessel. He was logged as a deserter and the District Court held him guilty of desertion and only allowed him half of his wages. The Circuit Court of Appeals reversed and allowed the seaman the total of his wages.

In *Scott v. Rose*, Fed. Cas. 12, 545, it was held that a seaman who left the vessel because of illness of his wife was not guilty of desertion. The court said his absence under such circumstances was "not in any sense a desertion by the maritime law."

Under the principles enunciated and set forth by the admiralty courts in the cases cited, it seems clear that under the facts in this case the petitioner should not be held guilty of desertion. Compare, for example, the conduct of the captain in *Gifford v. Hollock*, Fed. Cas. No. 5409, with the conduct of the captain in this case. In that case the court felt that the captain tended to produce the fault which it was sought to punish in that he over-indulged the seaman's request for withdrawals which placed the seaman in the difficulty, for which he felt leaving the vessel was the only remedy. In the case at bar the captain and the purser refused to send the petitioner ashore for medical assistance (Ap. 26). The captain did this in spite of the fact that his instructions from his own company were that "where it is necessary for a man to have medical treatment the instructions to the master of the vessel are that he is to provide those medical

services by private means or other means, whatever means are available." (Ap. 47)

Consider also the circumstances under which that refusal was made. A goodly portion of the town of Skagway was suffering from an epidemic which was called "virus flu." (Ap. 19) Petitioner became ill with similar symptoms. His work required him to be on deck and work in the cold wind (Ap. 25). When the ship left Skagway bound for Texas it would have aboard no pharmacist mate (Ap. 64) and, of course, the attentions and services of a physician, if needed, during that voyage would be unavailable.

The trial court assumed that this was nothing more than an ordinary cold. See, for example, the comment of the court in his decision (Ap. 73):

> "The court does not believe that the ship was not provided with sufficient medicine kits to take care of any *ordinary cold condition.*"

See also the examination of the Petitioner Humes by the court (Ap. 41). The doctor in Seattle referred to the illness as "virus X" (Pet. Ex. 2, Ap. 36) rather than as "virus flu" (Pet. Ex.1, Ap. 35) as did the doctor in Skagway. The trial court may be properly advised that "virus X" or "virus flu" are synonomous with "ordinary cold." If such is the case it does not appear of record nor is counsel so informed. In any event, the situation should be considered in the light of the belief of petitioner at the time. At that time the doctor in Skagway referred to it as "an epidemic of virus flu" and it is respectfully submitted that the petitioner was not chargeable with such knowledge

as the trial court may possess regarding the etiology of "virus flu."

That the petitioner left the ship for the sole reason of his fear of this disease is quite evident from the record. Petitioner has been a seaman for sixteen years (Ap. 32). Prior to the date of leaving the vessel he had been serving aboard this particular ship for approximately 13½ months and had made about fifteen round trips between Alaska and Seattle (Ap. 32). What change, if any, occurred other than petitiner's illness? None is shown by the record.

The petitioner, of course, was genuinely ill for he sought the services of a physician upon his return to Seattle where he was given penicillin and diathermy treatments at his own expense (Petitioner's Ex. 2, Ap. 36). The trial court emphasized the fact that Mr. Humes spent Thursday to Monday in Seattle at home in bed and did not seek the services of a physician and stated that petitioner could have done the same aboard the vessel; that is, stayed in bed (Ap. 5, 73). The obvious answer to that contention, of course, is that, nevertheless, the bed-rest did not cure the petitioner and he was required to seek the services of a physician, which would not have ben available aboard the vessel. In addition, even had the bed-rest cured the petitioner, that is now a matter of hind-sight. When one is suffering from a dread disease which has reached epidemic proportions, the availability of expert medical attention is considered imperative, whether actually used or not. Many persons suffering from virus flu or virus X or kindred diseases would be extremely reluctant to place themselves beyond the

protective nearness of expert medical attention. One of the reasons for this, of course, is that the illness may always take a turn for the worse. How many times has such illness developed complications and death resulted because of the lack of immediately available expert attention? Was the petitioner obliged to assume that his condition would improve, or might he also have assumed that he might get worse before he got better? Under the circumstances of this case petitioner was even entitled to asume that he might have been refused what medical attention was available aboard the vessel, for when he asked for a hospital slip the purser presumed to tell him that he did not need one and this action was sustained by the captain (Ap. 25, 26). Might the petitioner then not assume that a request for penicillin, for example, en route to Texas would be denied on the grounds that "he did not need it"?

Aside from his illness the undisputed evidence is that petitioner demanded the payment of his wages prior to leaving the ship. The entry in the log book stated that he demanded full payment (Ap. 18-19), but petitioner testified that he only demanded partial payment (Ap. 27). Title 46, Section 597, U.S.C.A. provides that every seaman upon demand shall be entitled to receive one-half part of the balance of his wages earned and remaining unpaid, and upon the failure of the master to comply the seaman is released from his contract. Whether the seaman's demand is for half or full wages would appear to be immaterial as long as the captain was aware of the demand for

wages. In this respect this case falls squarely within the holding in *In re Williams*, 139 F.(2d) 262.

At most it can be said in this case as was said in the *Magee* case (*Magee v. Ross*, Fed. Cas. No. 8944) that the petitioner left the ship under a belief that he had a right to do so and that the treatment that he had received from the captain had dissolved his contract. Even, as in the *Magee* case, if he were mistaken on these points, that is to say, mistaken as to his rights under the circumstances, it was an honest mistake and not a "mutinous resoluton" and his conduct both before and after the incident shows that he had a sincere confidence in his opinion and was "willing to bring it to a fair test."

II.

The District Court erred in assessing an excessive penalty under the circumstances (Specification of Error 3).

Even if the petitioner were technically guilty of desertion, the judgment of the court appears to be excessively harsh. Petitioner's presence aboard the vessel was required by the union contract requiring them to carry winch drivers to Alaska (Ap. 67) but there was no similar requirement on a trip to Texas (Ap. 67). In fact petitioner was not replaced by the company and the vessel was fully manned within the law and in such manner that she could be operated properly on the subsequent voyage (Ap. 68). See *Scott v. Rose*, Fed. Cas. No. 12, 545.

CONCLUSION

It is respectfully submitted that the trial court erred in holding that the petitioner was not justified in leaving the vessel and was guilty of desertion and that this court should reverse the judgment of the trial court accordingly.

Respectfully submitted,

BASSETT & GEISNESS,
Proctors for Appellant.